

B. TELOCATOR'S PROPOSAL IMPROPERLY RELIES UPON THE FCC'S PREVIOUS MISAPPLICATION OF THE SECTION 332 "FUNCTIONAL TEST" IN THE FLEET CALL ORDER.

In an overt reference to the FCC authorization of Fleet Call's enhanced SMR service, Telocator argues "[w]ith respect to private carriage, the rule changes would allow cellular carriers to offer services under the same...rules that apply to new ESMR competitors employing cellular-like system configurations." The actions taken and the rationale adopted by the FCC in the Fleet Call are not transferrable to the cellular arena under the provisions of the Communications Act. The amendments suggested would "...allow cellular licensees to provide auxiliary non-common carrier services under the Cellular Service Option." Petition at 3. Thus, it appears Telocator wishes cellular operators to be able to offer "private land mobile services" or other "private carrier" offerings under a single cellular license. Cellular operations are, by definition, common carriage under the FCC's regulations. Moreover, use of a single cellular license to offer both common and private carrier offerings seems to run afoul of even the Commission's interpretation of Section 332's functional test, *i.e.*, the cellular carrier, a "particular entity", would be "engaged functionally in the provision of telephone service ...as part of the entities' service offering." Fleet Call Order, paragraphs 29-30.

If what Telocator seeks is authority to offer "traditional" dispatch services, it may do so under the current law, but only by getting separate authorization and using frequencies specifically assigned for private land mobile services.

In any case, if the FCC grants "private carrier" status in this, or any other proceeding, to any "Fleet Call-type enhanced SMR" or other new "non-common carrier" service, it will be implicitly based upon its "Fleet Call" interpretation of Section 332's functional test. As NARUC has explained at some length in the pleadings filed in the Fleet Call proceeding, the FCC's application of that test impermissibly blurs the distinction between private and common carrier status.

Such action removes, in spite of the clear dictates and legislative history of both Sections 332 and 152(b) of the Communications Act, the state discretion to ensure that such new offerings provide the best, most efficient service to the public under reasonable rates, terms and conditions. Thus, this order not only raises serious questions under the Communications Act but also overlooks the well-established interests of the states in retaining jurisdiction over such services.

III. CONCLUSION For the foregoing reasons, NARUC respectfully requests the Commission to reject Telocator's Petition for Rulemaking.

APPENDIX C - THE MOBILE RADIO NEW ENGLAND PROCEEDING

In the Matter of
MOBILE RADIO NEW ENGLAND
Request for Wavier
of the Commission's Rules
File No. LMK-91260

- C-1 NARUC'S JANUARY 2, 1992 OPPOSITION TO MRNE'S REQUEST FOR WAIVER
- C-2 NARUC'S APRIL 10, 1992 APPLICATION FOR REVIEW OF PRB LR 7320-12
- C-3 NARUC'S MAY 1, 1992 APPLICATION FOR REVIEW OF PRB LR 7320-12
- C-4 NARUC'S MAY 8, 1992 REPLY TO OPPOSITIONS

APPENDIX C-1

NARUC'S JANUARY 2, 1992 OPPOSITION TO MRNE'S REQUEST FOR WAIVER

Pursuant to Sections 1.4 and 1.45 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. Sections 1.4 and 1.45 (1991), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully files these comments in opposition to the October 28, 1991 "REQUEST FOR RULE WAIVER" filed in the above-captioned proceeding. In opposition to Mobile Radio New England's ("MRNE") request, NARUC states as follows:

I. NARUC'S INTEREST

NARUC is a quasi-governmental nonprofit organization founded in 1889. Its member's include those governmental bodies of the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of carriers and utilities.

NARUC's mission is to improve the quality and effectiveness of public utility regulation in America. Specifically, NARUC is composed of the State officials charged with the duty of regulating telecommunications common carriers within their respective borders. As such, they have the obligation to assure those telecommunications services and facilities required by the public convenience and necessity are established, and that service is furnished at rates that are just and reasonable.

NARUC is concerned that the services proposed by MRNE are inadequately described, inconsistent with the statutory scheme, and, in light of the FCC's recent misapplication of Section 332 "functional test" in the Fleet Call order, may involve common carriage and thus be subject to regulation by the States, e.g., certifications standards, tariff requirements, non-discriminatory pricing prohibitions, complaint procedures, etc. See, 47 U.S.C. Sections 331(c)(3) and Section 332 (1990) and "{NARUC's} Petition for Reconsideration", filed April 15, 1991 in File No. LMK-90036 and addressing the FCC's Memorandum Opinion and Order ("Fleet Call Order"), In re Request of Fleet Call, Inc. released March 14, 1991, 6 FCC Rcd 1533(adopted February 13, 1991)(FCC 91-56). NARUC respectfully requests that the FCC incorporate its reconsideration request and other comments in the Fleet Call proceeding into the record in this proceeding. If the Commission indicates it is necessary, NARUC will be pleased to refile duplicate copies.

II. BACKGROUND

In 1982, Congress enacted Section 332(c)(1) to provide a "...clear demarcation between private and common carrier land mobile services." House Conference Report No. 97-765, Joint Explanatory Statement of the Committee of Conference on P.L. 97-259, The Communications Amendments Act ("House Report"), 97th Cong., 2nd Sess. 54, reprinted in, 3 U.S. Code Cong. & Ad. News '82 Bd. Vol., at pages 2237, 2298 (1983).

According to the conference report "...[t]he basic distinction...is a functional one, i.e., whether or not a particular entity is engaged functionally in the provision of telephone service or facilities of a common carrier as part of the entity's service offering. If so, the entity is deemed to be a common carrier." House Report, at 2237, 2298.

Significantly, in that report, the conferees also note that, although the FCC maintains its exclusive radio licensing authority, "...states retain full jurisdiction to engage in the economic regulation of common carrier stations (i.e., regulation of entry, rates and practices) consistent with Sections 2(b) and 221(b) of the Communications Act of 1934 (47 U.S.C. 2(b), 221(b) (1976)) to the extent they deem it necessary in the public interest to do so." House Report at page 2300. See also, NARUC v. FCC, 880 F.2d 422, 428 (D.C.Cir. 1989); California v. FCC, 905 F.2d 1217 (9th Cir. 1990). Moreover, the report goes on to note that the FCC "... may not use its licensing powers to circumvent limitations in its economic regulatory jurisdiction over common carrier station. {Emphasis Added}" House Report, at page 2300. Compare, NARUC v. FCC, 533 F.2d 601, 619 (D.C.Cir 1976), where the court found that "the authority to experiment broadens the [FCC's] freedom to promulgate innovative and perhaps speculative regulations of activities over which it otherwise exercises regulatory jurisdiction. It does not, however, give the FCC power to regulate activities experimentally, where...{the Commission lacks general jurisdiction}."

On April 5, 1990, Fleet Call, Inc. filed a proposal to create "enhanced" specialized mobile radio ("ESMR") systems. On February 13, 1991, the FCC granted authority to deploy this new service. The order notes that not only will Fleet Call provide, inter alia, "traditional dispatch service" which is not "functionally different from any service that it currently provides through its existing stations," but that "[a]dditionally, Fleet Call will be able to provide... interconnected telephone-type services." Fleet Call, mimeo at 5, para. 29. The FCC concluded that these changes did not affect Fleet Call's status as a "private land mobile carrier" under Section 332.

To the extent Fleet Call actually engages in common carrier service, this determination effectively preempts state regulation of ESMR. Fleet Call, mimeo at page 5, para.31.

On October 28, 1991, citing, inter alia, the Fleet Call Order as support, MRNE requested a series of waivers "...[t]o develop and implement ...improved, state-of-the-art services in an orderly manner." MRNE's October 1991 "Request for Waiver" at page 9. Among the services suggested were "networked wide-area coverage for both voice and data services, increased interconnected service, as well as increased demand for portable or personal communications (PCS-type) service oriented towards business and industrial users in the larger urban centers in New England. Further, ancillary services such as voice mail, electronic mail, transparent roaming, etc., are also increasingly in demand by traditional two-way customers." Id. In November, the FCC asked for comments on the proposed waiver. "Order", In the Matter of Mobile Radio New England Request for Waiver, File No. LMK 91260, Adopted November 18, 1991 and Released December 2, 1991. (DA91-1454).

III. DISCUSSION

A. MRNE'S proposal does not provide enough detail for FCC action.

MRNE's proposal lacks sufficient detail for the Commission to take action. MRNE asks the FCC to allow various waivers of its rules - noting that its current "channel capacity and network system architecture are not currently suitable to meet" "increased market pressure from customers for improved or enhanced services." MRNE's October 1991 "Request for Waiver" at page 9.

Other than some brief descriptions concerning the increased demand for "interconnected service,...portable or personal communications (PCS-type) service...[which may include such ancillary services as]...transparent roaming," the petition does not present any significant detail about actual services to be implemented. Id. It is impossible to assess, based upon the limited information included in the application, whether the resulting services will remain "private" under Section 332's functional test.

For example, MRNE is silent on how it plans its "increased interconnection" with the telephone network. Congress intended to and actually enacted legislation to prohibit SMR systems from "interconnecting with common carrier facilities if the licensees or entrepreneurs are engaging in the resale of telephone service or facilities.

See, House Report, at 2255. Compare, Report and Order, Docket no. 888-69, 3 FCC Rcd 1838 (1988) at Paragraph 24; Memorandum Opinion and Order, Docket 88-392, 4 FCC Rcd 356 (1988) at Paragraph 10, and 47 U.S.C. Section 332(c). MRNE's request, like Fleet Call's, changes the basic nature of SMR service and further blurs the distinctions between private and common carrier offerings. The striking similarities to the Fleet Call waiver proceeding, the likelihood of similar requests by other SMR providers, and the obstacles such waiver grants impose to an appropriate application of the Section 332 "functional" test, lends credence to all the arguments presented in the Fleet Call proceeding, intoning that a Section 90.151 waiver application is not the appropriate procedural vehicle to address such requests. Additionally, NARUC believes that granting the proposed waivers exceeds the limits on Commission discretion delineated in the jurisprudence and its own regulations.

See, generally, 47 C.F.R. Section 90.151, which requires a showing that "unique circumstances are involved" and WAIT Radio v. FCC, 418 F. 2d 1153 (D.C. Cir 1969), which suggests that waivers should be granted in only those limited circumstances when the policy behind the rule to be waived would not be harmed, or may perhaps be even furthered, by its non-application. Waiver proceedings were not meant to be used for drastic and wholesale changes of the regulations in place which depart from prior policies. Here, as in Fleet Call, the effect of granting this request is a significant departure from long-standing Commission rules.

- B. To the extent MRNE's proposed nondescript "enhanced" Services involve Common Carriage, grant of any waivers will be improperly based upon a misapplication of the Section 332 "FUNCTIONAL TEST".

Because of the lack of specificity concerning the nature of the services intended and MRNE's reliance on the Fleet Call order as justification for granting its waivers, NARUC is concerned that much of the "improved or enhanced services" MRNE intends to offer may in fact be common carrier service subject to state regulation. Without additional information concerning the proposed services, if the FCC grants these waiver requests and allows MRNE to maintain its "private carrier" status, it will be implicitly based upon an application of Section 332's functional test, as applied in the Fleet Call proceeding, to the proposed "improved" or "enhanced" services. As NARUC has explained at some length in the pleadings filed in the Fleet Call proceeding, the FCC's current interpretation and application of that test impermissibly blurs the distinction between private and common carrier status.

Such action removes, in spite of the clear dictates and legislative history of both Sections 332 and 152(b) of the Communications Act, the state discretion to ensure that such new offerings provide the best, most efficient service to the public under reasonable rates, terms and conditions.

Thus, this order not only raises serious questions under the Communications Act but also overlooks the well-established interests of the states in retaining jurisdiction over such services.

III. CONCLUSION

For the foregoing reasons, NARUC respectfully requests the Commission to reject MRNE's Request for Waiver.

APPENDIX C-2

NARUC'S APRIL 10, 1992

APPLICATION FOR REVIEW OF PRIVATE RADIO BUREAU LETTER 7320-12

Pursuant to Sections 1.115 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. Sections 1.115 (1991), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully files this application for review of the Letter 7300-01 ruling ("Letter Ruling") from the Private Radio Bureau ("Bureau") in File LMK-91260.

On January 2, 1992, NARUC filed comments opposing Mobile Radio New England's ("MRNE") October 28, 1991 "REQUEST FOR RULE WAIVER" filed in the above-captioned proceeding. The Bureau's¹ February 13, 1992 Letter rejects NARUC's comments in opposition.

¹ The Letter Ruling clearly denies NARUC's opposition on its merits, as opposed to dismissing it for (1) lack of standing - as was done to the California Commission's MRNE opposition, or (2) purported noncompliance with the FCC's procedural regulations - as was done in the Fleet Call proceeding. However, interestingly, in footnote 5 of the Letter Ruling, the Bureau notes, without further comment, that MRNE argues that NARUC lacks standing. Also, in footnote 1, the Bureau, states, again without further comment, that NARUC's opposition is really a petition to deny and that the FCC's rules do not allow the filing of petitions to deny.

As far as MRNE's argument is concerned, first, both the courts, the FCC, and the Communications Act recognize that NARUC is an appropriate entity to represent the collective interests of the State commissions. In the statutory language of the Congress, NARUC is "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities. See, *United States of America v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), *aff.* 672 F.2d 469 (5th Cir. Unit "B" 1982); *aff. en banc*, 702 F.2d 532 (5th Cir. Unit "B" 1983, *rev'd*, 471 U.S. 48 (1985). See also *Indianapolis Power and Light Co. v. Interstate Commerce Commission*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976). Secondly, as NARUC pointed out in its opposition, the action taken in this docket could easily impair state commission operations by removing, in spite of the clear dictates and legislative history of both Sections 332 and 152(b) of the Communications Act, state discretion to ensure that new offerings

I. ARGUMENTS

A. MRNE'S proposal does not provide enough detail for FCC action.

NARUC, in its opposition, noted the fact that the record in this proceeding is inadequate to grant the relief MRNE seeks, i.e., MRNE's proposal lacks sufficient detail for the Commission to take action.

"MRNE asks the FCC to allow various waivers of its rules - noting that its current "channel capacity and network system architecture are not currently suitable to meet" "increased market pressure from customers for improved or enhanced services." MRNE's October 1991 "Request for Waiver" at page 9...Other than some brief descriptions concerning the increased demand for "interconnected service,...portable or personal communications (PCS-type) service...[which may include such ancillary services as]...transparent roaming," the petition does not present any significant detail about actual services to be implemented. Id. It is impossible to assess, based upon the limited information included in the application, whether the resulting services will remain "private" under Section 332's functional test." NARUC Opposition at 5.

The Letter Ruling fails to respond to this argument in any meaningful fashion - merely repeating MRNE's inadequate description of the services proposed and suggesting that the same services could be offered on MRNE's current network.

B. Even if one assumes, arguendo, the record were complete, the Bureau has failed to conduct an appropriate analysis of MRNE's application, i.e., assuming, arguendo, that (1) the FCC's current regulations do not, on their face, contravene the statutory restrictions on SMR service in Section 332, and (2) MRNE's application is in "technical" compliance with those regulations, the Bureau must still examine the application to assure that a carrier's proposed operations are not "functionally equivalent" to common carriage service.

like MRNE's provide the best, most efficient service to the public under reasonable rates, terms and conditions.

As far as the FCC's regulations are concerned, the Bureau's own December 1991 notice cites 47 C.F.R. Section 1.45 of the FCC's general rules as the authority for its grant of the extension of time to file oppositions. See, "Memorandum Opinion and Order", In the Matter of Mobile Radio New England Request for Waiver, File No. LMK 91260, Adopted November 18, 1991 (DA91-1454). NARUC contends that (1) its pleading was clearly such an opposition, and (2) any party can use Section 1.45 as the basis for filing an opposition to "any motion, petition, or request." {Emphasis Added}.

As the Letter Ruling notes at pages 1 and 2, NARUC is concerned that the services proposed by MRNE are inadequately described, inconsistent with the statutory scheme, and, in light of the FCC's recent misapplication of Section 332 "functional test" in the Fleet Call order, may involve common carriage and thus be subject to regulation by the States, e.g., certification standards, tariff requirements, non-discriminatory pricing prohibitions, complaint procedures, etc. See, 47 U.S.C. Sections 331(c)(3) & 332 (1990) and "{NARUC's} Petition for Reconsideration", filed April 15, 1991 in File No. LMK-90036 ("Fleet Call") and addressing the FCC's Memorandum Opinion and Order ("Fleet Call Order"), In re Request of Fleet Call, Inc., 6 FCC Rcd 1533 (2/13/91)(FCC 91-56).

Indeed, the central thrust of NARUC's complaint is that, even if one assumes,² arguendo, (1) that the FCC's current regulations technically comply with the statutory prohibitions established by Congress in Section 332 of the Communications Act on SMR services, and (2) that MRNE's application is facially in compliance with those regulations, a careful and detailed functional examination of any proposed new service is necessary. Purported technical compliance with the current FCC regulations does not, in itself, assure that a carrier's operations comply with the functional evaluation required by Congress when enacting Section 332 - a thesis amply demonstrated, in NARUC's view, by the factual aftermath of the FCC approval in the Fleet Call proceeding.³

² Which NARUC does not. See generally, the comments filed by NARUC and others in the Fleet Call proceeding.

³ See, e.g., (i) the company's current view of its operations - Fleet Call's October 18, 1991 filed Form S-1 Registration Statement Under the Securities Act of 1933, Registration No. 33-43415, which states that "...[a]s a result of the FCC decision and recent advances in technology, the Company believes it has the opportunity to position itself as the third major provider of mobile telephone services in Los Angeles, San Francisco, New York, Chicago, Dallas and Houston, competing directly with cellular operations..." Emphasis Added. It is important to note, that having a third "cellular" carrier in a particular market is desirable from NARUC's viewpoint; however, it does raise many issues of public policy, particularly if states' ability to impose regulations is limited to only two of the market participants; See also the March 16, 1992 "Mobile Insider's FastFax (BIA publication), stating "Now it can be told...Wall Street sensed it two years ago...The mobile industry knew it because operators could read between the lines..." and quoting Fleet Call's Chairman O'Brien as stating that its network will "go head to head with McCaw to serve the same customers"; (ii) the Administration's view of Fleet Call's operations - Remarks of then Assistant Secretary of Commerce for Communications and Information, Janice Obuchowski, at

the Donaldson, Lufkin & Jenrette Cellular Conference at the Waldorf-Astoria Hotel on June 20, 1991, noting that "...More controversial, of course, is the FCC's recent decision to allow Fleet Call to offer a cellular-type service (enhanced SMR) in six large urban markets using bandwidth currently allocated to it for private radio dispatch services." "Spectrum Management Reform: What's Good for America is Good for American Business" Text at page 8. (For text copies, call Ms. Doherty at 202-337-1551), (3) the business community's view of Fleet Call, and other SMR provider's, operations: "Suddenly a license to run a taxi dispatch service is a ticket to get into the cellular business... Fleet Call owns rights to broadcast voice and data over radio frequencies reserved for taxicab dispatchers in New York , Chicago, Los Angeles, San Francisco, Dallas and Houston...As such , it is a potential competitor to the country's high-flying cellular telephone operators...Lining up behind Fleet Call with their eyes on the public equity trough are other dispatchers." "The taxicab as phone company", Gary Slutsker, Forbes, January 6, 1992. Fleet (Footnote 3 Continued)...Call's - and, based upon the limited information provided, apparently MRNE's - fully interconnected systems, which will hand-off a user's conversation as the user passes from one cell to another are functionally indistinguishable to the consumer from true cellular. Even before the FCC's Fleet Call decision issued, when asked how Fleet Call's system would differ from true cellular, Fleet Call's Vice President Jack Markell was quoted in an industry trade publication as responding "...[t]here are four major differences: (1) ESMR will not have nationwide roaming, (2) ESMR will have less spectrum, (3) ESMR will have user licensing, cellular does not, and (4) ESMR will offer dispatch service, cellular does not." Fleet Call to Invest 500 Million in New SMR System, NABER's SMR Letter, May 1990 at 2. To the user these distinctions are of little if any significance, i.e., the user perceives ESMR as the functional equivalent of cellular service - indeed, as the remarks quoted above and in earlier filings in the Fleet Call Proceeding demonstrate, not only do industry, Wall Street, and Administration officials seem to agree about the functional equivalency of these new "enhanced" type services, but Fleet Call itself is obviously pushing and relying on that "cellular" perception as the basis for its marketing and financing plans. The amount of spectrum used and the fact that ESMR can offer dispatch service are of no interest to a user looking for mobile telephone service. Even the user licensing requirement is immaterial to the end-user, for, currently, end user licensing is a simple, perfunctory process and the end user can begin using the service the day he subscribes, without awaiting issuance of the license. See 47 C.F.R. Section 90.657 (1991). The only distinction of any, albeit minimum, significance to a potential user of the service, was the supposed lack of nationwide roaming. Not surprisingly, on February 26, 1992, Fleet Call issued

In this order, as in Fleet Call, the Private Radio Bureau has not undertaken an appropriate functional analysis of the Mobile Radio New England application. Indeed, the Letter Ruling, other than noting that MRNE's application "...proposes to provide wide-area coverage for both voice and data communication services, including interconnected services, portable or personal communication services...and ancillary communications services like roaming," eschews any pretense of a functional analysis of MRNE's application, merely stating that "...[t]he private status of land mobile radio services was fully addressed by the Commission in Fleet Call, Inc., supra. [footnote omitted] We see no need, therefore to restate the Commission's discussion concerning the private status of Specialized Mobile Radio services like⁴ that proposed by Mobile Radio New England." Letter Ruling at 3. Such reliance on the Fleet Call order findings ignores the Commission's obligation to make specific factual findings based upon substantial evidence in the record in this proceeding.

Indeed such reliance gives credence to arguments raised by NARUC in this proceeding - and NARUC and others during the Fleet Call proceeding - that (1) the FCC cannot take action such as that proposed in this proceeding without engaging in its rulemaking procedures and (2) granting the proposed waivers exceeds the limits on Commission discretion delineated in the jurisprudence and its own regulations. See, generally, 47 C.F.R. Section 90.151, which requires a showing that "unique circumstances are involved" and WAIT Radio v. FCC, 418 F. 2d 1153 (D.C. Cir 1969).

a three page press release announcing it had "joined the Digital Mobile Network Roaming Consortium...formed in late January by a group of major...SMR..operators who intend to install advanced digital radio systems and offer compatible mobile communications services on a nationwide basis...Customers on any system managed by a member of this consortium will learn to expect high quality service practically anywhere they go."

⁴ NARUC's original comments specifically request the incorporation of its reconsideration request and other comments in the Fleet Call proceeding into the record in this proceeding. NARUC believes because (i) the factual aftermath of the Fleet Call proceeding amply demonstrates the need for a more detailed/functional analysis of MRNE's application, and because of (ii) the Private Radio Bureau's explicit reliance on the rationale espoused in the Fleet Call Order, and (iii) to assure a complete record, that the FCC should incorporate the entire record of the Fleet Call proceeding in this proceeding. NARUC's respectfully requests such incorporation by reference. If the Commission indicates it is necessary, NARUC will be pleased to refile duplicates of all pertinent documents.

Moreover, if the Commission declines to examine the particular characteristics raised in each new SMR waiver application proceeding, preferring instead to attempt to rely on the findings predicated upon the factual record generated in the Fleet Call Proceeding, its dismissal of NARUC's petition for reconsideration of the original Fleet Call Order and rejection of extensive arguments concerning the need for a rulemaking is untenable.

After all, early in that proceeding (June 8, 1990), the FCC issued an order (DA90-828), stating that "[t]ypically, adjudicatory proceedings address the rights and responsibilities of a small, easily identified, group of parties. [The] broad scope of coverage [requested by FCI] in terms of both the relief requested and the parties affected, takes [FCI's] proposal out of the category of typical "adjudication" and places it more appropriately in the categories of "informal rulemaking or "inquiry" proceedings." That order allowed certain procedural regulations reserved for informal rulemaking proceedings to apply to the Fleet Call Proceedings. Subsequently, however, the FCC rejected NARUC's petition for reconsideration on the basis of another procedural regulation⁵ - this regulation applicable only to adjudicatory proceedings.

Thus, in dismissing NARUC's reconsideration request, the FCC made it clear that the factual findings derived from the Fleet Call Proceeding are specific to that case. It would be the quintessential "arbitrary and capricious" agency action for this Commission, after rejecting (1) extensive arguments that a rulemaking is required to make these types of determinations and (2) requests for reconsideration based purely upon a procedural regulation applicable only to adjudications, to then turn around and claim the determinations made must be applied without further discussion in any subsequent SMR case involving waivers and new digital services.

⁵ Under the procedural regulations applicable to informal rulemakings, NARUC did not have to be a party to file for reconsideration - part of the basis for rejecting its original request for reconsideration. According to the regulations that apply to "informal rulemakings" "Any interested person" [not just a "party" as in the regulations that apply to adjudications] can file a petition for reconsideration. See, 47 C.F.R. 1.429(a) (1991). Such "interested persons" can thereby acquire "party" status even if they have not timely filed "comments on a notice of proposed rule making,...or responsive pleadings". SEE Section 1.400 - "As used in this subpart, the term "party" refers to any person who participates in a proceeding by the timely filing of a petition for rule making, comments on a notice of proposed rule making, a petition for reconsideration, or responsive pleadings in the manner prescribed by this subpart. The term does not include those who submit letters, telegrams or other informal materials."

II. CONCLUSION

For the foregoing reasons, NARUC respectfully requests the Commission to overrule the Bureau's Letter Ruling and reject MRNE's request for waivers.

Additionally, in accordance with a recently passed resolution, NARUC encourages the FCC to reclassify spectrum or use some other reasonable and legal method/procedure to allow systems like MRNE to provide competition to cellular services without having a preemptive effect on State regulation. See, NARUC Bulletin, No. 10-1992, pp. 8-9.

APPENDIX C-3

NARUC'S MAY 1, 1992

APPLICATION FOR REVIEW OF PRIVATE RADIO BUREAU LETTER 7320-12

Pursuant to Sections 1.115 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. Sections 1.115 (1991), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully files this application for review of the Letter 7320-12 ruling ("Letter Ruling") from the Private Radio Bureau ("Bureau") in File LMK-91260.

On January 2, 1992, NARUC filed comments opposing Mobile Radio New England's ("MRNE") October 28, 1991 "REQUEST FOR RULE WAIVER" filed in the above-captioned proceeding.⁶ The Bureau's April 13, 1992 Letter grants MRNE's requests.

I. ARGUMENTS

A. MRNE'S proposal does not provide enough detail for FCC action.

NARUC, in its opposition, noted the fact that the record in this proceeding is inadequate to grant the relief MRNE seeks, *i.e.*, MRNE's proposal lacks sufficient detail for the Commission to take action.

"MRNE asks the FCC to allow various waivers of its rules - noting that its current "channel capacity and network system architecture are not currently suitable to meet" "increased market pressure from customers for improved or enhanced services." MRNE's October 1991 "Request for Waiver" at page 9...Other than some brief descriptions concerning the increased demand for "interconnected service,...portable or personal communications (PCS-type) service...[which may include such ancillary services as]...transparent roaming," the petition does not present any significant detail about actual services to be implemented. Id.

⁶ As the April 13, 1992 letter notes, the Bureau has denied NARUC's opposition to MRNE's requests. NARUC is filing this request for review, which is almost identical to its April 10, 1992 request for review of the Bureau's February 13, 1992 letter order, to assure that no procedural lapses prevent further appeals of the issues raised in this proceeding.

It is impossible to assess, based upon the limited information included in the application, whether the resulting services will remain "private" under Section 332's functional test." NARUC Opposition at 5.

The Letter Ruling fails to respond to this argument in any meaningful fashion.

B. Even if one assumes, arguendo, the record were complete, the Bureau has failed to conduct an appropriate analysis of MRNE's application, i.e., assuming, arguendo, that (1) the FCC's current regulations do not, on their face, contravene the statutory restrictions on SMR service in Section 332, and (2) MRNE's application is in "technical" compliance with those regulations, the Bureau must still examine the application to assure that a carrier's proposed operations are not "functionally equivalent" to common carriage service.

NARUC is concerned that the services proposed by MRNE are inadequately described, inconsistent with the statutory scheme, and, in light of the FCC's recent misapplication of Section 332 "functional test" in the Fleet Call order, may involve common carriage and thus be subject to regulation by the States, e.g., certification standards, tariff requirements, non-discriminatory pricing prohibitions, complaint procedures, etc. See, 47 U.S.C. Sections 331(c)(3) & 332 (1990) and "{NARUC's}" Petition for Reconsideration", filed April 15, 1991 in File No. LMK-90036 ("Fleet Call") and addressing the FCC's Memorandum Opinion and Order ("Fleet Call Order"), In re Request of Fleet Call, Inc., 6 FCC Rcd 1533 (2/13/91)(FCC 91-56).

Indeed, the central thrust of NARUC's complaint is that, even if one assumes, arguendo, (1) that the FCC's current regulations technically comply with the statutory prohibitions established by Congress in Section 332 of the Communications Act on SMR services, and (2) that MRNE's application is facially in compliance with those regulations, a careful and detailed functional examination of any proposed new service is necessary. Purported technical compliance with the current FCC regulations does not, in itself, assure that a carrier's operations comply with the functional evaluation required by Congress when enacting Section 332 - a thesis amply demonstrated, in NARUC's view, by the factual aftermath of the FCC approval in the Fleet Call proceeding.

⁷ Which NARUC does not. See generally, the comments filed by NARUC and others in the Fleet Call proceeding.

⁸ See, e.g., (i) the company's current view of its operations - Fleet Call's October 18, 1991 filed Form S-1 Registration Statement Under the Securities Act of 1933,

Registration No. 33-43415, which states that "....[a]s a result of the FCC decision and recent advances in technology, the Company believes it has the opportunity to position itself as the third major provider of mobile telephone services in Los Angeles, San Francisco, New York, Chicago, Dallas and Houston, competing directly with cellular operations..." Emphasis Added. It is important to note, that having a third "cellular" carrier in a particular market is desirable from NARUC's viewpoint; however, it does raise many issues of public policy, particularly if states' ability to impose regulations is limited to only two of the market participants; See also the March 16, 1992 "Mobile Insider's FastFax (BIA publication), stating "Now it can be told...Wall Street sensed it two years ago...The mobile industry knew it because operators could read between the lines..." and quoting Fleet Call's Chairman O'Brien as stating that its network will "go head to head with McCaw to serve the same customers"; (ii) the Administration's view of Fleet Call's operations - Remarks of then Assistant Secretary of Commerce for Communications and Information, Janice Obuchowski, at the Donaldson, Lufkin & Jenrette Cellular Conference at the Waldorf-Astoria Hotel on June 20, 1991, noting that "...More controversial, of course, is the FCC's recent decision to allow Fleet Call to offer a cellular-type service (enhanced SMR) in six large urban markets using bandwidth currently allocated to it for private radio dispatch services." "Spectrum Management Reform: What's Good for America is Good for American Business" Text at page 8. (For text copies, call Ms. Doherty at 202-337-1551), (3) the business community's view of Fleet Call, and other SMR provider's, operations: "Suddenly a license to run a taxi dispatch service is a ticket to get into the cellular business... Fleet Call owns rights to broadcast voice and data over radio frequencies reserved for taxicab dispatchers in New York , Chicago, Los Angeles, San Francisco, Dallas and Houston...As such , it is a potential competitor to the country's high-flying cellular telephone operators...Lining up behind Fleet Call with their eyes on the public equity trough are other dispatchers." "The taxicab as phone company", Gary Slutsker, Forbes, January 6, 1992. Fleet Call's - and, based upon the limited information provided, apparently MRNE's - fully interconnected systems, which will hand- (Footnote 3 Continued)...off a user's conversation as the user passes from one cell to another are functionally indistinguishable to the consumer from true cellular. Even before the FCC's Fleet Call decision issued, when asked how Fleet Call's system would differ from true cellular, Fleet Call's Vice President Jack Markell was quoted in an industry trade publication as responding "...[t]here are four major differences: (1) ESMR will not have nationwide roaming, (2) ESMR will have less spectrum, (3) ESMR will have user licensing, cellular does not, and (4) ESMR will offer dispatch service, cellular does not." Fleet Call to Invest 500 Million in New SMR System, NABER's SMR Letter, May 1990 at 2. To

In this order, as in Fleet Call, the Private Radio Bureau has not undertaken an appropriate functional analysis of the Mobile Radio New England application. Indeed, the Letter Ruling eschews any pretense of a functional analysis of MRNE's application, merely stating that "[t]he relief that you seek fails within the scope of our decisions in Fleet Call, Inc., 6 FCC Rcd 1533, 9recon. dismissed, 6 FCC Rcd 6989 (1991)..." Letter Ruling at 1.

the user these distinctions are of little if any significance, i.e., the user perceives ESMR as the functional equivalent of cellular service - indeed, as the remarks quoted above and in earlier filings in the Fleet Call Proceeding demonstrate, not only do industry, Wall Street, and Administration officials seem to agree about the functional equivalency of these new "enhanced" type services, but Fleet Call itself is obviously pushing and relying on that "cellular" perception as the basis for its marketing and financing plans. The amount of spectrum used and the fact that ESMR can offer dispatch service are of no interest to a user looking for mobile telephone service. Even the user licensing requirement is immaterial to the end-user, for, currently, end user licensing is a simple, perfunctory process and the end user can begin using the service the day he subscribes, without awaiting issuance of the license. See 47 C.F.R. Section 90.657 (1991). The only distinction of any, albeit minimum, significance to a potential user of the service, was the supposed lack of nationwide roaming. Not surprisingly, on February 26, 1992, Fleet Call issued a three page press release announcing it had "joined the Digital Mobile Network Roaming Consortium...formed in late January by a group of major...SMR..operators who intend to install advanced digital radio systems and offer compatible mobile communications services on a nationwide basis...Customers on any system managed by a member of this consortium will learn to expect high quality service practically anywhere they go."

9 NARUC's original comments specifically request the incorporation of its reconsideration request and other comments in the Fleet Call proceeding into the record in this proceeding. NARUC believes because (i) the factual aftermath of the Fleet Call proceeding amply demonstrates the need for a more detailed/functional analysis of MRNE's application, and because of (ii) the Private Radio Bureau's explicit reliance on the rationale espoused in the Fleet Call Order, and (iii) to assure a complete record, that THE FCC SHOULD INCORPORATE THE ENTIRE RECORD OF THE FLEET CALL PROCEEDING IN THIS PROCEEDING. NARUC RESPECTFULLY REQUESTS SUCH INCORPORATION BY REFERENCE. If the Commission indicates it is necessary, NARUC will be pleased to refile duplicates of all pertinent documents.

Such reliance on the Fleet Call order findings ignores the Commission's obligation to make specific factual findings based upon substantial evidence in the record in this proceeding.

Indeed such reliance gives credence to arguments raised by NARUC in this proceeding - and NARUC and others during the Fleet Call proceeding - that (1) the FCC cannot take action such as that proposed in this proceeding without engaging in its rulemaking procedures and (2) granting the proposed waivers exceeds the limits on Commission discretion delineated in the jurisprudence and its own regulations. See, generally, 47 C.F.R. Section 90.151, which requires a showing that "unique circumstances are involved" and WAIT Radio v. FCC, 418 F. 2d 1153 (D.C. Cir 1969).

Moreover, if the Commission declines to examine the particular characteristics raised in each new SMR waiver application proceeding, preferring instead to attempt to rely on the findings predicated upon the factual record generated in the Fleet Call Proceeding, its dismissal of NARUC's petition for reconsideration of the original Fleet Call Order and rejection of extensive arguments concerning the need for a rulemaking is untenable.

After all, early in that proceeding (June 8, 1990), the FCC issued an order (DA90-828), stating that "[t]ypically, adjudicatory proceedings address the rights and responsibilities of a small, easily identified, group of parties. [The] broad scope of coverage [requested by FCI] in terms of both the relief requested and the parties affected, takes [FCI's] proposal out of the category of typical "adjudication" and places it more appropriately in the categories of "informal rulemaking or "inquiry" proceedings." That order allowed certain procedural regulations reserved for informal rulemaking proceedings to apply to the Fleet Call Proceedings. Subsequently, however, the FCC rejected NARUC's petition for reconsideration on the basis of another procedural regulation - this regulation applicable only to adjudicatory proceedings. ¹⁰

¹⁰ Under the procedural regulations applicable to informal rulemakings, NARUC did not have to be a party to file for reconsideration - part of the basis for rejecting its original request for reconsideration. According to the regulations that apply to "informal rulemakings" "Any interested person" [not just a "party" as in the regulations that apply to adjudications] can file a petition for reconsideration. See, 47 C.F.R. 1.429(a) (1991). Such "interested persons" can thereby acquire "party" status even if they have not timely filed "comments on a notice of proposed rule making, ...or responsive pleadings". SEE Section 1.400 - "As used in this subpart, the term "party" refers to any person who participates in a proceeding by the timely filing of a petition for rule making, comments on a notice of proposed rule making, a petition for reconsideration, or responsive pleadings in the manner

Thus, in dismissing NARUC's reconsideration request, the FCC made it clear that the factual findings derived from the Fleet Call Proceeding are specific to that case.

It would be the quintessential "arbitrary and capricious" agency action for this Commission, after rejecting (1) extensive arguments that a rulemaking is required to make these types of determinations and (2) requests for reconsideration based purely upon a procedural regulation applicable only to adjudications, to then turn around and claim the determinations made must be applied without further discussion in any subsequent SMR case involving waivers and new digital services.

II. CONCLUSION

For the foregoing reasons, NARUC respectfully requests the Commission to overrule the Bureau's Letter Ruling and reject MRNE's request for waivers.

Additionally, in accordance with a recently passed resolution, NARUC encourages the FCC to reclassify spectrum or use some other reasonable and legal method/procedure to allow systems like MRNE to provide competition to cellular service without having a preemptive effect on State regulation. See, Resolution Regarding Preemption of State Regulation of Wireless Common Carrier Services, NARUC Bulletin, No. 10-1992, pp. 8-9.

prescribed by this subpart."

APPENDIX C-4

NARUC'S MAY 8, 1992 REPLY TO OPPOSITIONS

Pursuant to Sections 1.115 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. Sections 1.115 (1991), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully files this reply to the oppositions filed to its April 10, 1992 application for review of the Letter 7300-01 ruling ("Letter Ruling") from the Private Radio Bureau ("Bureau") in File LMK-91260.

On January 2, 1992, NARUC filed comments opposing Mobile Radio New England's ("MRNE") October 28, 1991 "REQUEST FOR RULE WAIVER" filed in this proceeding. The Bureau's Letter Ruling denied that opposition. Accordingly, NARUC filed an application for review of the Letter Ruling. On April 27, 1992, five oppositions to NARUC's request were filed. Most of the arguments raised in all five oppositions were covered in Fleet Call, Inc.'s ("FCI") filing. Accordingly, NARUC will address FCI's arguments first and then discuss any additional arguments raised by the other four parties.

I. RESPONSE TO ARGUMENTS RAISED IN FCI'S OPPOSITION:

FCI's opposition purports to present four arguments, labeled A through D., for rejection of NARUC's opposition. When carefully scrutinized - all of the arguments presented lack merit. Moreover, some of the arguments are internally inconsistent or otherwise incompatible with FCI's actions and statements - either in the instant opposition or in other forums/pleadings.

A. The statute is ambiguous and a proper determination of Congressional intent requires examination of its legislative history.

FCI's Section C. argument suggests that (i) the text of Section 332 is clear, unambiguous, and contains no functional test of private carriage, and (ii) therefore, it is not necessary to look to the legislative history¹¹ to distinguish between private and common carrier SMR services.

¹¹ See FCI Opposition at 8-10. Specifically, citing four cases, FCI states: "When the language of a statute is clear and unambiguous, inquiry into its meaning is complete except in those

1. Courts and the FCC have found it necessary to resort to the legislative history of Section 332 to discern Congressional intent.

Apparently, both the courts and the FCC do not agree with FCI's contention. The D.C. Court of Appeals, in a case addressing Section 332, not only found that there was at least enough ambiguity in the "clear language of the statute" to warrant granting review, but also found it necessary to refer to the legislative history in its discussion of whether the FCC's "interpretation" of Section 332 "...is consistent with the intent of Congress and the statute's basic service."¹²

rare and exceptional circumstances where such reading is demonstrably inconsistent with the intent of the statute." *Id.* at 10. It is clear FCI is citing an accepted rule of statutory construction. What is not clear, as demonstrated above, is the language of Section 332 - hence, neither this construction rule, nor the cases cited to support it, are relevant to this proceeding.

¹² See, Telocator Network of America v. FCC, 761 F.2d 763, 764 (1985) where the Court found it necessary to address the "central legal issue" of whether certain customers were "authorized users" within the meaning of Section 332. Curiously, although arguing with great force that the statute is ambiguous and thus the legislative history irrelevant, FCI fails to recognize that the case it relies upon, and even quotes, later in its opposition provides compelling evidence of the inaccuracy of its arguments concerning the clarity of Section 332. This oversight is incomprehensible when one considers that the quote FCI lifts from this case (i) immediately follows a specific reference to Section 332's legislative history and (ii) is a conclusion apparently drawn, at least in part, from an examination of the legislative history. Compare, note 26 and page 13 of FCI's opposition with Telocator, 761 F. 2d 768 [headnote 2] (1985). As will be discussed later in this reply, other than clearly demonstrating the facial ambiguity of Section 332, Telocator is does not speak to the specific issues raised by this proceeding.

Indeed, the FCC itself, when purporting to decide "the test for determining whether the preemption provisions of Section 332 apply to a given communication system" - the issue at the heart of the controversy in this proceeding - looked both to the text of the statute and its legislative history - finding that the test "...as set forth in Section 332(c)(1)...and its legislative history, turns on whether the system is engaged in resale of telephone services or facilities of a private carrier." [Emphasis added] ¹³

2. Even a cursory review of Section 332 and related sections demonstrates the Acts' inherent ambiguity.

In support of its conclusory assertion that the statute is unambiguous and reference to the legislative history is not necessary, FCI "demonstrates" the clarity of the statute by pointing out the first major deficiency/ambiguity in the statute, to-wit, "Section 332(c) expressly includes SMRs within the category of private land mobile systems..." ¹⁴

Nowhere in the Act is the term SMR [or for that matter "multiple licensed radio dispatch systems"] defined. Admittedly, SMR must be a subset of "private land mobile service" which is defined as "a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations . . . for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation."¹⁵ But SMR is not defined anywhere in the act, unless one wants to refer to it as only a "radio dispatch system" - a term also, incidentally, not defined anywhere in the Act.

¹³ See, American Teltronix, 5 FCC Rcd 1955, 1956 paras. 8 - 9 (1990). See also, DataComm, Inc., 104 FCC 2d 1311, where the FCC's analysis of this issue quotes and relies heavily on Section 332's legislative history. Indeed, as to whether there is a "functional test", the FCC states: "Section 331(c)(1)...creates a functional test of private carriage" Id. at 1314. It is true, however, that DataComm's functional test is the same "primary" test outlined in the FCI proceeding and, includes the same Section 332 characterizations that FCI claims support its arguments.

¹⁴ FCI Opposition at 10.

¹⁵ 47 U.S.C. Section 153(gg) (1990). If, as seems a dead certainty, MRNE follows the same pattern as FCI, and offers services to compete "head to head" for current "cellular" common carriage customers - it is difficult to understand how the individual "end-users'" use of the system could comply with the statutes' requirement that the "group" regularly interact.

In other words, the act defines PLMS and then states that PLMS includes SMR. FCI suggests that "an SMR is a private land mobile radio system" - this circular references/bootstrapping of one definition into another provide no additional insight into what SMR actually entails. The modifying language in Section 332(c)(1) injects more uncertainty by adding more terms that are not defined in the statute, e.g., "radio dispatch system", "authorized users. Indeed, as mentioned earlier, the term "authorized users" has already been taken to the D.C. Circuit for clarification.¹⁶

The discussion of another critical "ambiguity" in the statute, the meaning of the interconnection restriction, is reserved for the discussion responding to other FCI arguments, infra.

Because, as demonstrated above, the meaning of the statute is not clear on its face, resort to the legislative history is required.

- B. NARUC does not dispute that interconnection is allowed under the terms of Section 332(1)(A)&(B); however, NARUC does contend that the FCC analysis¹⁷ - in the FCI order that was incorporated by reference in this proceeding to justify granting MRNE's request - lacks record support and does not meet the statute's requirements.

Throughout its arguments, FCI focuses on the 10 year span that has elapsed since enactment of Section 332 in 1982 - attempting to develop the appealing, but unfortunately inaccurate, thesis that "... NARUC simply refuses to accept the fact, established for more than 10 years, that SMRs can legally provide interconnected service to eligible users as private carriers."¹⁸

¹⁶ See Note 2, supra.

¹⁷ [-of the terms, conditions, and circumstances under which such interconnection is allowed-]

¹⁸ FCI's Opposition at 7. See also pages 11 - 12 where FCI states that the legislative history "...specif[ies] that private systems may be interconnected with the public switched telephone network -- a point NARUC conveniently and repeatedly ignores."

1. NARUC has never disputed that PLMS can interconnect under appropriate circumstances.

In making these isolated statements, FCI fails to cite to any pleading filed by NARUC in this proceeding where NARUC has argued that interconnection for PLMS/SMR is impermissible under the statute. The explanation for this failure is simple - there are no such citations; NARUC does not dispute that PLMS providers can provide interconnected service. The statute is clear that interconnection is permissible in certain circumstances.¹⁹

¹⁹ It is true, that in NARUC's April 15, 1991 Petition for Reconsideration in the FCI Proceeding, incorporated into this proceeding by reference, NARUC argued that the FCC's conclusions about the absence of telephone resale ignores FCI's admission, that it will provide interconnected mobile telephone service and suggests that "...even under the Commission's reading of the record, substantial evidence exists that ESMR falls outside the statutory definition of private radio."

It is also true that NARUC's arguments focus upon the functional equivalency of MRNE's service.

However, it is not true that NARUC believes that ANY SMR interconnected with the wireline network is, under the statutory test, a "common carrier". NARUC's arguments must be read in context. All of NARUC's arguments suggest that the services that MRNE will provide are, within the meaning of Section 332, functionally equivalent to common carriage, and that when examining whether the interconnection and other requirements of the statute are met, the FCC must engage in a functional analysis. Suggesting that such an examination is a prerequisite for approval can only be premised on the fact that, in some instances, interconnection is allowed.

If NARUC believes as FCI suggests, that interconnection is never allowed under the statute, NARUC's suggestions for the content of - and the requirement of - a functional test makes no sense. All of those suggestions presuppose, to the discerning reader, that interconnection is allowed. For example, in NARUC's May 10, 1991 Reply to Oppositions, filed in the FCI Proceeding and incorporated into this proceeding by reference, NARUC suggests that such a functional analysis might include the following:

(1) An examination of whether "FCI's public descriptions of ...its new services clearly suggest that spectrum allocated for dispatch service is being significantly used to provide common carrier message service." See, for example, FCI's explicit reliance - not on dispatch or other traditional SMR offerings - but on its ability to provide a cellular-type service as "the third major provider...competing directly with cellular operations" to generate additional financing of its operations. Fleet Call's October 18, 1991 filed Form S-1 Registration Statement Under the Securities Act of 1933, Registration No. 33-43415.